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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional): F7764(V)

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]

on _____

Signature _____

Typed or printed name _____

Application Number	Filed
10/590,645	August 25, 2006

First Named Inventor: Veldhuizen

Art Unit	Examiner
1789	Thuy Tranlien

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)
- ☑ attorney or agent of record. Registration number 29,412
- ☐ attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34: _____

/Gerard J. McGowan, Jr./
Signature

Gerard J. McGowan, Jr.
Typed or printed name

201-894-2297
Telephone number

12/23/2011
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☐ *Total of _____ forms are submitted.

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8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

Attorney Docket No.: F7764(V)
Serial No.: 10/590,645
Filed: August 25, 2006
Confirmation No.: 1494

PRE-APPEAL BRIEF REQUEST FOR REVIEW - REMARKS

Sir:

In response to the Office Action mailed September 27, 2011, please consider the following remarks.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

Remarks/Arguments begin on page 2 of this paper.

REMARKS

Reconsideration of the application is respectfully requested in view of the following remarks.

The present invention is directed to the discovery that bakery products containing a sterol and/or stanol ester, in combination with a selected emulsifier, show reduced staling on storage. The Office points to no teaching from which this discovery would be expected nor to any composition which anticipates the claim.

As recited in claim 10, the invention comprises a bakery product having flour and from 0.5-15 wt% on flour of sterol and/or stanol fatty acid ester. The bakery product further includes from 0.1-1% by weight of emulsifier on flour. The emulsifier is one or more of a group of emulsifiers recited in claim 10.

The Office rejects the claims as obvious over Yuan et al. Yuan et al. disclose a sterol composition which includes emulsifier and mentions approximately 25 different types of products in which it may be used. However, Yuan et al. do not provide any formulas for most of their suggested products, whereas the present claims recite specific levels of the sterol/stanol and emulsifier on flour. Therefore, it is difficult to see how the present invention could be considered *prima facie* obvious in view of Yuan et al. since Yuan et al. do not appear to discuss flour in their products or levels thereof.

The Office uses Karppanen et al. "as evidence" in the Yuan et al. obvioiusness rejection. Example 1 of Karppanen et al. is entitled "white bread" and includes wheat flour, plant sterols and some emulsifiers. The Office presents calculations to show that

use of the Yuan et al. ingredient in Karppanen et al.'s bread would bring one of ordinary skill within the levels recited within the present claims. However, the calculations appear to be flawed.

The Office points to the presence of 30 kilograms of flour in Karppanen et al. However, in [0026], Karppanen et al. include 7.5 kilograms wheat flour in a premix and in paragraph [0027] the ingredients listed are added to the premix. Therefore, it appears that the 30 kilograms of wheat flour referenced by the Office is added to the premix, so that the 30 kilogram figure is not correct.

The Office makes two calculations. In the first, the Office assumes that Yuan et al's percentage by weight for the ingredient in the product (see column 6, second full paragraph) is by weight only of flour. Although applicants use weight percent on flour, applicants specifically indicate on flour. In contrast, the Office points to no indication that Yuan et al. intend weight percent on flour so it is submitted that wt% in the entire product is called for.

The Office's second calculation (see top of page 4 in Office Action of September 27, 2011), is based on the weight percent of the Yuan et al. ingredient applied to the overall Karppanen et al. product, not just flour. However, the Office then considers the weight percent of sterol ester and emulsifier on the overall product instead of on flour as recited in present claim 10. Even though wt % on the full product should be considered when trying to apply Yuan et al.'s teachings as to the level of their ingredient in another reference in accordance with Yuan's teachings, when trying to compare the combined references to the present claimed levels of sterol ester and emulsifier, the claimed weight percent on flour needs to be used. Thus, either way, erroneous results are obtained.

The Office points to the teaching of 1 wt% emulsifier by Yuan et al. The total white bread of example 1 of Karppanen appears to include 68.7 kilograms of ingredients. 1% of 68.7 is 0.687 kilograms of emulsifier presumably added in the Yuan et al. ingredient. Even ignoring the extra emulsifier present in the "FORMAT" component of the Karppanen et al. white bread, dividing 0.687 by 37.5 kilograms of wheat flour (total of both the top and the bottom boxes of example 1) results in 1.8%. 1.8 exceeds the 1% recited in claim 10. Similarly, as to sterols/stanols, 20% of 68.7 is 13.7; 70% of 13.7 is 9.6. 9.6 divided by the level of wheat flour in example 1 is 25.6%, which exceeds the 15 wt% recited in claim 10. Therefore, the levels selected by the Office do not appear to result in products within applicants' claims.

Even if it is possible to select levels within the ranges of Yuan et al. which could be chosen to result in products within applicants claimed ranges, it is submitted that this hindsight reconstruction is not permitted by the patent laws.

In addition, the Office indicates that the unexpected result disclosed in the present specification is inherent in Yuan et al. As pointed out above, Yuan et al. do not disclose compositions for most of their laundry list of potential products. Therefore, it is difficult to see how Yuan et al. teaches any product within the claims, especially that Yuan et al. could inherently produce the same results. Moreover, the rejection is based on obviousness and the Office points to no authority indicating that inherency is a relevant factor in obviousness.

Since the Office has not found applicants' composition disclosed in Yuan et al., since the Office does not present a *prima facie* case of obviousness and since the Office has

not demonstrated that the results obtained are expected, it is respectfully requested that the rejection be withdrawn.

Respectfully submitted,

/Gerard J. McGowan, Jr./

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